

December 4, 1997  
L-97-50

**TO** : John L. Thoresdale  
Director of Policy and Systems

**FROM** : Steven A. Bartholow  
Deputy General Counsel  
*Through:* Catherine C. Cook  
General Counsel

**SUBJECT** : Administrative Finality - Part 261

This is in response to your memorandum of September 25, 1997, in which you inquire about the application of the effective date of Part 261 of the Board's regulations, Finality of Decisions Regarding Railroad Retirement Annuities. This regulation was published in the Federal Register on August 29, 1997, with an effective date of September 29, 1997. 62 Fed. Reg. 45712. Part 261 replaces Basic Board Order 75-5, section 17, on the same subject matter.

You inquire as to how Part 261 applies to situations where an initial decision was made under the old reopening guidelines prior to September 29, 1997, and the decision is now at the reconsideration stage or on appeal within the agency. Clearly, effective September 29, 1997, a decision to reopen or not reopen a final decision should be based on the rules set forth in part 261 rather than the former Board Order. However, in the cases about which you inquire, a decision to reopen a final decision has been made prior to September 29, 1997 under the Board Order, apparently with adverse consequences to the annuitant, and the annuitant has sought review of that decision. For example, the initial adjudicating unit has determined that a final annuity award was incorrectly computed and then reopens that award for correction and assessment of an overpayment. The reopening would have been permitted under the Board Order, but not under part 261.

With respect to this scenario, you raise three separate questions. You first ask whether the action taken as a result of the reopening, e.g., the rate correction, should be reversed and the previous rate restored. We are of the opinion that if

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the decision to reopen was correct under the Board Order in effect at the time of the decision to reopen, the decision correcting the annuity rate (the reopening) should not be reversed on reconsideration. Your second and final questions concern any action to collect an overpayment resulting from the reopening. In our view, if the decision on recovery is still under administrative review on or after September 29, 1997, and the overpayment would not exist if the reopening rules in Part 261 were applied to the case, further recovery actions should cease. Any of the overpayment already collected need not be refunded unless, of course, the overpayment is later waived under the waiver provisions of the RRA or RUIA. In this regard, please keep in mind that the decision to reopen is distinct from a determination whether waiver applies. Thus, a determination to reopen a final decision does not preclude waiver of any overpayment which may ensue from the reopening.

cc: Chief Financial Officer  
Director of Hearings and Appeals